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RIGHT OF MOTHER TO RECOVER FOR DEATH OF ILLEGITIMATE CHILD.—At common law no action lay for damages resulting from the death of a human being.¹ All such actions are purely statutory. Practically all of our states have such statutes, and all of them, under certain circumstances, give the mother a right of action for the death of her child. But whether or not this right extends to the mother of an illegitimate child is a question upon which our jurisdictions are at variance.

It is necessary for a correct understanding of the principles involved in the answer to the above problem to trace briefly the changes in the laws regarding bastards from the old common law to the present time. By the common law an illegitimate child was treated with the utmost severity.² He was denied all the rights of an heir. He was related to nobody and could have no heirs save those of his body. If he died without such descendants, his property escheated. But through a relaxation in these harsh doctrines of the ancient common law, the bastard by the English law has been placed upon an equal footing with his fellow subjects with the exception of the right of inheritance and succession.³ However, in the United States legislation has gone even farther than this and today an illegitimate child may inherit property from its mother, and the mother from such a child, in practically every state in the Union.⁴

This being the situation, we come to the question of whether or not a mother may bring an action for the death of her illegitimate child. In many of our states it has been held that she may not.⁵ The reason for such holdings is based upon two considerations. First, the right of action for death by wrongful act is purely statutory, being unknown at common law, and hence the rule of construction that statutes in derogation of the common law are to be strictly construed must apply.⁶ Second, the word *child* or *children* at common law meant only those who were *legitimate* unless the context was such as to require a different construction.⁷ Thus, the conclusion is reached that such statutes

¹ *Carey v. Berkshire R. Co.*, 1 Cush. (Mass.) 475, 48 Am. Dec. 616 (1848) and note; *Insurance Co. v. Brame*, 95 U. S. 754.

² 1 Bl. Com. 459; and see *Dickason Coal Co. v. Liddil*, 49 Ind. App. 40, 94 N. E. 411 (1911).

³ 2 Kent, Com. (12th Ed.) 264.

⁴ See *Moore v. Moore*, 169 Mo. 432, 69 S. W. 278, 53 L. R. A. 451; 24 Am. and Eng. Enc. Law 414.

⁵ *Robinson v. Georgia Railroad & Banking Co.*, 117 Ga. 168, 43 S. E. 452, 97 Am. St. Rep. 156, 60 L. R. A. 555 (1903); *State v. Hagerstown*, etc., R. Co. (Md.), 114 Atl. 729 (1921); and see Wash., etc., R. Co. v. State, 136 Md. 103, 111 Atl. 164 (1920).

⁶ *Citizens St. R. Co. v. Cooper*, 22 Ind. App. 459, 53 N. E. 1092, 72 Am. St. Rep. 319 (1889); *Indianapolis*, etc., R. Co. v. *Keely's Adm'r*, 23 Ind. 133 (1864).

⁷ *Robinson v. Georgia Railroad & Banking Co.*, *supra*; *Alabama*, etc., R. Co. v. *Williams*, 78 Miss. 209, 28 So. 853, 51 L. R. A. 836 (1900); *Floyd v. Floyd*, 97 Ga. 124, 24 S. E. 451 (1895).

give the mother a right of action for the death of only her *legitimate* child or children. The fact that the mother by statute may inherit from such illegitimate son and transmit to him is not considered by these courts to be material to the issue.

But many of our jurisdictions have held that these statutes allow an action by the mother for the death of an illegitimate child.⁸ These decisions are based upon the belief of the courts that the legislative intent, as indicated by statutes in those states allowing an illegitimate child to inherit from and transmit inheritances to its mother, is to place such an illegitimate, as regards its mother, in substantially the same status as a child born in lawful wedlock.⁹ As stated by Chancellor Kent, with the exception of the right of inheritance and succession, bastards by the English law are placed upon an equal footing with their fellow-subjects, while in this country we have made progress towards giving them also the capacity to inherit.¹⁰ It would thus appear that where the legislature has removed the common law disability as to the right of inheritance and succession with reference to the bastard and his mother, the bastard, so far as his relations to his mother is concerned, has the same status as a legitimate child. The mother of the bastard is now legally entitled to its custody and services and is bound for its support. In short, the law now regards it as her *child*.¹¹

Hence, when by statute the mother is permitted to recover for the wrongful death of her child, the courts which allow recovery when such child is illegitimate contend that, so far as bastards are concerned, they have no fathers recognized as such by any law, but as to the rights of their mothers to recover for their wrongful death under the statute, they occupy the same status before the law as a legitimate child.

While the statute of death by wrongful act is in derogation of the common law and should under the general rule receive a strict construction, at the same time it should be borne in mind that it is a remedial statute also and that it should not receive so narrow a construction as to defeat the intention of the lawmaking power in its enactment.¹²

It would appear that where the statute giving bastards the right

⁸ Dickason Coal Co. v. Liddil, *supra*; Galveston, etc., R. Co. v. Walker, 48 Tex. Civ. App. 52, 106 S. W. 705 (1908); Andrzejewski v. Northwestern Fuel Co., 158 Wis. 170, 148 N. W. 37 (1914); Wheeler v. Southern R. Co., 111 Miss. 528, 71 So. 812 (1916); Hadley v. City of Tallahassee, 67 Fla. 436, 65 So. 545 (1914); Security Title & Trust Co. v. West, etc., R. Co., 91 Ill. App. 332 (1900); Marshall v. Wabash R. Co., 120 Mo. 275, 25 S. W. 179 (1894); and see Southern R. Co. v. Hawkins (D. C.), 35 App. Cas. 313 (1910). And see 17 C. J. 1220.

⁹ Andrzejewski v. N. W. Fuel Co., *supra*; Security Title and Trust Co. v. West, etc., R. Co., *supra*; Galveston, etc., R. Co. v. Walker, *supra*.

¹⁰ 2 Kent, Com. (12th Ed.) 264.

¹¹ Galveston, etc., R. Co. v. Walker, *supra*.

¹² Hadley v. City of Tallahassee, *supra*.

of inheritance and succession with reference to the mother was passed prior to the enactment of the statute permitting recovery for death by wrongful act, the former statute and its intent were in the minds of the legislators when the latter was enacted.¹³ This would also be the case where both statutes were passed during the same session.¹⁴ Even when the inheritance and succession statute came subsequent to the death by wrongful act statute, it would seem that the latter statute would speak prospectively and speak not merely of the time it took effect, but every moment while it continues in force, and in any given case the question of who is in such relation to the deceased as to be able to recover must be determined by the law in force at the time the action is brought.¹⁵

It is a noteworthy fact that the trend of opinion seems to be that a mother may sue for the death of her illegitimate child. The early cases were nearly unanimous in holding that she could not;¹⁶ but, as may be seen from the dates of the cases cited in connection with this note, the great majority of the more recent cases hold that she may. It would seem that, in view of the general tendency of our courts today toward humane and liberal decisions, it might be predicted that the jurisdictions which are not already bound by precedents will hold that a mother may sue for the death of her illegitimate child.

The contrary view was taken by the Maryland court in the recent case of *State v. Hagerstown, etc., R. Co.*¹⁷ which was decided in June 1921. The case, however, is based upon authority of a rather unsatisfactory character. Three cases were cited.¹⁸ The first two were not in point, the first being a question of inheritance of a bastard child¹⁹ and the second being on the right of a bastard to sue for the death of his father under the Workmen's Compensation Act.²⁰ The third case cited refused to permit an illegitimate to recover for death of its mother but relied strongly upon the preceding case.²¹ Besides these cases the court cited Ruling Case Law²² and Corpus Juris²³. Ruling Case Law does give the weight of opinion as being that a mother may not sue

¹³ *Andrzejewski v. Northwestern Fuel Co., supra.*

¹⁴ *Security Title & Trust Co. v. West, etc., R. Co., supra.*

¹⁵ See *Security Title & Trust Co. v. West, etc., R. Co., supra.*

¹⁶ The following cases hold that the mother may not sue; but it seems that these states had no statute permitting her to inherit from an illegitimate son. *Runt v. Illinois, etc., R. Co.*, 88 Miss. 575, 41 So. 1 (1906); *Lynch v. Knoop*, 118 La. 611, 43 So. 252, 8 L. R. A. (N. S.) 480 (1907).

¹⁷ (Md.) 114 Atl. 729 (1921).

¹⁸ *Barron v. Zimmerman*, 117 Md. 296, 83 Atl. 258 (1912); *Scott v. Independent Ice Co.*, 135 Md. 343, 109 Atl. 117 (1919); *Washington, etc., R. Co. v. State*, 136 Md. 103, 111 Atl. 164 (1920).

¹⁹ *Barron v. Zimmerman, supra.*

²⁰ *Scott v. Independent Ice Co., supra.*

²¹ *Washington, etc., R. Co. v. State, supra.*

²² 3 R. C. L. 769.

²³ 17 C. J. 1219.

for the death of her illegitimate child. But *Corpus Juris* says: "Where there are statutes substantially legitimizing bastards as to the mothers, as conferring on them the right to inherit or transmit inheritances from or through the mother, a mother may recover for the death of her bastard child."²⁴ Yet the court cites this work as authority for the opposite view.

It must be borne in mind that this note applies only to the right of a *mother* to recover for the death of her illegitimate child. The right of the *father* of such a child is not considered.

This precise question does not seem to have arisen in Virginia.

W. C. H.

CONSTRUCTION OF THE LIMITED LIABILITY ACT.—Some difference of opinion has existed regarding the correct construction of Section 4283 of the Revised Statutes of the United States, part of what is commonly known among Admiralty practitioners as the Limited Liability Act. This section is as follows:

"The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

Where only one vessel is at fault "without the privity or knowledge of such owner", and there is no question of joint undertaking involved, it is clear that upon surrender of the faulty vessel, or her present value, plus freight then pending, the shipowner has completed his part and may step out of the controversy. And where two or more vessels belong to the same owner, and both, say, contribute negligently to an accident both must be surrendered.¹ But the question becomes more difficult of solution when we consider the case of more than one vessel, all belonging to the same owner, engaged in a joint enterprise, where one of the vessels, in pursuit of the joint undertaking, commits a tort. What must the owner surrender in order to limit his liability under the Act? Must he pay into court the value of the single wrongdoing vessel plus freight, or the value of the whole flotilla engaged in the joint enterprise? The words of the Act are "* * * shall in

²⁴ 17 C. J. 1220.

¹ *The Eugene F. Moran*, 212 U. S. 466 (1909); *The Bordentown*, 40 Fed. 682 (1889); *The San Rafael*, 141 Fed. 270 (1905); *Thompson, etc., Assn. v. McGregor*, 207 Fed. 209 (1913); *Shipowners, etc., Co. v. Hammond*, 218 Fed. 161 (1914).